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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAVON JONES, Defendant and Appellant.	B236963 (Los Angeles County Super. Ct. No. BA382185)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Reversed and remanded with directions.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a case settlement agreement, defendant and appellant Ravon Jones entered a plea of no contest in count 1 to evading an officer (Veh. Code, § 2008.2, subd. (a)) and in count 2 of indecent exposure (Pen. Code § 314).[1] Defendant also admitted he had suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court dismissed another open case against defendant (No. BA382107) pursuant to the plea agreement. The court denied probation and sentenced defendant to the high term of three years on count 1 and eight months on count 2 (one third of the middle term), both doubled as a result of the strike prior conviction, for a total of seven years four months in state prison. Defendant was ordered to pay $110 in attorney fees pursuant to section 987.8, in addition to other fines.

Defendant argues that: (1) the trial court violated his due process rights and committed reversible error in denying his motion for a *Marsden*[2] hearing; (2) defense counsel rendered ineffective assistance by refusing to move for withdrawal of defendant's plea of no contest; and (3) the trial court erred in imposing attorney fees under section 987.8 without making an ability to pay finding. The Attorney General contests defendant's first two arguments but concedes the trial court erred in imposing attorney fees.

We conditionally reverse and remand the cause to the trial court to allow defendant to present any complaints regarding trial counsel in a *Marsden* hearing. Any claim of ineffective assistance of counsel may be resolved at the *Marsden* hearing. The order fixing attorney fees is also reversed, and if a new trial is not granted, any order of attorney fees is to be set following the procedures in section 987.8.

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1 Unless otherwise indicated, all statutory references are to the Penal Code.

2 *People v. Marsden* (1970) 2 Cal.3d 118, 124-125.

FACTS[3]

Circumstances of Defendant's Arrest

On the morning of March 15, 2011, a witness reported observing defendant masturbating in a grocery store parking lot. Los Angeles Police Officers Pelczar and Mateus responded to the scene in a marked police car. Officer Pelczar was in uniform. The officers spotted defendant, who matched the description the witness had given, driving a car consistent with the vehicle the witness had described. When the officers began to follow him, defendant accelerated to a speed of 20-30 miles per hour in disregard to the safety of people walking in the parking lot. Defendant stopped his vehicle facing the officers, who activated the patrol car's lights and sirens. Officer Pelczar got out of the patrol car, made eye contact with defendant, and yelled for him to stop. In response, defendant put his car in reverse and left the parking lot. He accelerated to approximately 50 miles per hour, ran a red light, and abandoned his vehicle in an alley. He was found in a crawlspace. The witness identified defendant as the man who had been masturbating.

Sentencing Hearing

The contested issues raised by defendant are both related to the following discussion at sentencing:

"The Court: There was some discussion regarding medication that may have affected [defendant's] ability to appreciate his actions when he entered his plea. We did subpoena the medical records from the jail. [¶] [Defense Counsel], you reviewed those

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[3] Because defendant entered pleas of no contest, the facts are drawn from the preliminary hearing transcript.

medical records and are finding no legal cause why we should not go forward with sentencing at this point in time?

"[Defense counsel]: Without going into the reasons – some of which, you know, go to attorney-client privilege – yes, I'm finding no legal cause at this time.

"The Court: All right. So we are going forward with sentencing now?

"[Defense counsel]: We are. Just to be clear, the client had expressed –

"The Defendant: I object to that, Your Honor.

"[Defense counsel]: – I – The client had expressed a desire –

"The Defendant: I didn't express nothing. I'd like a *Marsden* hearing. That is what I'd like, Your Honor.

"[Defense counsel]: – to file a motion to dismiss. But based on my analysis of the case and, again, my – my work product, I do think it would be meritless. And so under *People v. Brown*, which is 175 Cal.App.4th, 1469, I am making a tactical decision that we are not – or that we – there is no legal cause at this time.

"The Court: All right. Waive time for formal arraignment, no legal cause?

"[Defense counsel]: Yes.

"The Court: Pursuant to the plea bargain in this matter, probation is denied. Sentence is imposed as follows: I do order Mr. Jones imprisoned in state prison for a total term of –

"The Defendant: So the court is violating my due process?

"The Court: – 7 years, 4 months. I select the high term on count 1 of 3 years. That's per plea agreement. It is doubled as a result of the admission of the strike prior conviction. [¶] As to count 2, Mr. Jones is sentenced to an additional 8 months. Again, doubled. And that would be consecutive for, again, a total of 7 years and 4 months. [¶] [Defense counsel], what is Mr. Jones's credit?

"[Defense counsel]: 217 actual.

"The Defendant: So I'm not entitled to a *Marsden* hearing, Your Honor? And I'm asking for one because it's a problem.

"The Court: I'm not going to do a *Marsden* hearing, Mr. Jones.

"The Defendant: Well, I'm not agreeing to this being sentenced at all due to the fact my attorney and the other lady that took my transcripts, my – my medical record took something out of my medical record showing that there's no medication that I've been receiving or that's saying I was taking medication. So the court and my attorneys violate my due process rights.

"[Defense counsel]: Your Honor, just so the court knows, I will, in addition to what's already been done, be filing in the appeal an application to – certificate of probable cause to the court so that Mr. Jones can have his due process.

"The Court: All right.

"The Defendant: Since you ain't going –

"The Court: I'm sorry. Credit again?

"The Defendant: I'm objectin'."

DISCUSSION

Whether the Trial Court Erred in Denying Defendant's Motion for a *Marsden* Hearing

Defendant argues that the trial court violated his due process rights and committed reversible error in denying his motion for a substitution of counsel hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 124-125 (*Marsden*). We agree defendant was entitled to a *Marsden* hearing upon his request on the date of sentencing.

"The governing legal principles [derived from *Marsden*] are well settled. 'Under the Sixth Amendment right to assistance of counsel, """[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."""" [Citation.] Furthermore, """"When a defendant seeks to discharge appointed counsel and substitute another attorney, and asserts inadequate representation,

the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance.'"'" [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 95.) Where the trial court has not afforded the defendant an opportunity to explain the basis for his request for substitution of counsel, remand for the court to conduct a *Marsden* hearing is the appropriate remedy. (*People v. Sanchez* (2011) 53 Cal.4th 80, 92 (*Sanchez*).)

The Attorney General concedes that the trial court did not hold a *Marsden* hearing. Instead, she asks this court to find any error harmless, because defendant moved to dismiss his counsel due to a tactical disagreement.

People v. Washington (1994) 27 Cal.App.4th 940 (*Washington*), cited by the Attorney General, is distinguishable from the case at bar. In *Washington*, the defendant made a *Marsden* motion in conjunction with a motion for new trial. The motion for new trial was heard and denied, but the trial court failed to hold a *Marsden* hearing. (*Id*. at pp. 942-943.) On appeal, the court concluded that any error was harmless, because given the timing of the motion, the only basis for granting the motion would be that counsel performed ineffectively at trial or could not adequately represent the defendant at sentencing. (*Id*. at p. 944.) Due to the circumstances of the case, the *Washington* court was able to review the record and conclude there was no basis for concluding counsel rendered ineffective assistance. (*Ibid*.) The *Washington* court reasoned that its ability to evaluate counsel's representation, combined with the defendant's failure to make a showing that his *Marsden* motion would have been granted, or that he would have had a more favorable result if the motion had been granted, established that any error was harmless. (*Ibid*.)

Here, the trial court failed to give defendant the opportunity to explain the basis for his motion to substitute counsel, despite defendant's attempts to do so. We do not accept the Attorney General's interpretation of defendant's statements as indicating that defendant moved to substitute counsel solely on the bases that trial counsel refused to move to withdraw his plea of no contest and/or mishandled his medical records. Although defendant's *Marsden* motion was made during the discussion of defendant's

desire to withdraw his plea and defense counsel's refusal to do so, defendant was never granted permission to speak regarding his specific reasons for requesting substitution of counsel. As defendant points out, the court completely ignored defendant's first request for a *Marsden* hearing. When defendant made a second request for a *Marsden* hearing, the court unequivocally, and without any discussion, stated that it would not hold a *Marsden* hearing. To the extent defendant was able to articulate any reasons for the motion, he was only able to do so after his two requests for a *Marsden* hearing were summarily denied. It is not clear from the record whether defendant expressed all of his grounds for making a *Marsden* motion. Thus, in contrast to the situation in *Washington*, here there is simply no basis upon which we are able to decide whether the error was harmless. (*People v. Winbush* (1988) 205 Cal.App.3d 987, 991 ["[a]n appellate court cannot speculate upon the basis of a silent record that the trial court, after listening to defendant's reasons, would decide the appointment of new counsel was unnecessary"].)

The correct procedure on remand to remedy this form of *Marsden* error is set forth in *Sanchez, supra*, 53 Cal.4th at page 92, as follows: "'(1) the court shall hold a hearing on [defendant]'s *Marsden* motion concerning his representation by the public defender's office; (2) if the court finds that [defendant] has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any motions made are denied, or [defendant]'s *Marsden* motion is denied, the court shall reinstate the judgment.'"

Whether Trial Counsel Rendered Ineffective Assistance by Refusing to Move to Withdraw Defendant's Plea of No Contest

Defendant argues that trial counsel rendered ineffective assistance by refusing to move for withdrawal of defendant's plea of no contest.

"Penal Code section 1018 provides in pertinent part: 'Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. . . . On application of the defendant at any time before judgment the court may, . . . for a good cause shown, permit the plea of guilty [or nolo contendere] to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice.'" (*People v. Brown* (1986) 179 Cal.App.3d 207, 213.) The decision to either enter or withdraw a plea rests with the defendant. (*Id*. at p. 215.) "[W]here . . . a defendant seeks to withdraw a plea on the ground that his attorney of record has not provided adequate representation . . . [t]he trial court should first elicit and consider the defendant's reasons for believing he has been ineffectively represented, making such inquiries of the defendant and trial counsel as appear necessary in open court or, if the trial court deems necessary, at an in camera hearing. [Citation.] If the defendant 'presents a colorable claim that he was ineffectively represented,' the trial court should appoint new counsel 'to fully investigate and present the motion.' [Citation.] A defendant presents a colorable claim when he 'credibly establishes to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings.' [Citation.] If the defendant does not present a colorable claim, the court may deny the motion without providing for new counsel. [Citation.]" (*People v. Garcia* (1991) 227 Cal.App.3d 1369, 1377 (*Garcia*), fn. omitted.)[4] A defendant who presents a colorable claim for ineffective assistance of counsel must still establish good cause for withdrawing his plea, which may include "'[m]istake, ignorance or any other factor overcoming the exercise of free judgment . . . .'" (*Id*. at p. 1377 & fn. 3.)

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[4] The prosecution contends that the procedure outlined in *Garcia* has since been overruled by our Supreme Court in *People v. Smith* (1993) 6 Cal.4th 684. This is incorrect. *Smith* only overruled *Garcia* to the extent that it indicates the standard for appointment of counsel at the postconviction stage differs from the usual standard.

The Attorney General argues that defendant failed to make a claim for ineffective assistance of counsel below, because he expressed only that his attorney mishandled his medical records and/or that he had a tactical disagreement with trial counsel as to whether to move to withdraw his plea of no contest. We do not read the record as narrowly as the Attorney General, and in any event, any claim defendant may have may be brought to light at the *Marsden* hearing on remand.

A defendant is entitled to relief under *Marsden* if he makes a showing that counsel rendered ineffective assistance " 'or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 204.) Here, defendant was not afforded the opportunity to explain the grounds for his *Marsden* motion, so it is impossible to discern that his basis was not, in fact, counsel's ineffective assistance.

The Attorney General also argues that defendant waived his challenge to the denial of his motion to withdraw his plea by failing to formally present it to the trial court. We reject this argument as well. The trial court and trial counsel were in the midst of discussing whether there was sufficient basis for defendant to move to withdraw his plea when defendant made his *Marsden* request. Trial counsel had just stated that there were no grounds for the motion to withdraw the plea and was beginning to inform the trial court that defendant disagreed with his assessment[5] when defendant objected and

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5 At sentencing, trial counsel stated that defendant wished to move to have the case "dismissed." The prosecution treats this language as a literal statement of defendant's position on whether to bring a motion to dismiss and not a misstatement intended to refer to defendant's position on the motion to withdraw the plea. We agree with defendant that trial counsel intended to refer to defendant's disagreement with counsel concerning the motion to withdraw the plea, rather than to some disagreement over a previously unmentioned motion to dismiss. Trial counsel made the statement directly following his assertion that there was no legal basis for arguing medication had affected defendant's ability to appreciate his actions when he entered his plea. He stated that he wanted to clarify defendant's position and cited to *People v. Brown* (2009) 175 Cal.App.4th 1469, in which the Court of Appeal held that trial counsel had no duty to move for withdrawal of the defendant's plea if such a motion is legally unsupported. He then averred it was his tactical decision that there was no legal cause to bring the motion.

asked for a *Marsden* hearing. Contrary to the prosecution's assertion, defendant's statement that he "didn't express nothing" could not have been a rejection of his counsel's statement that defendant wanted him to bring a motion to withdraw the plea, because trial counsel had not yet informed the court of defendant's position on the motion. In context, it appears that defendant wished to prevent counsel from purporting to speak on his behalf on any issue, because he immediately asked for a *Marsden* hearing. Counsel then went on to explain that defendant disagreed with him with respect to the motion to withdraw the plea, and defendant made a second *Marsden* motion.

Defendant's request for a *Marsden* hearing, coupled with trial counsel's refusal to present the motion to withdraw the plea, despite defendant's wishes, constitutes an effective expression that he wished to move to withdraw his no contest plea on the basis that his counsel was ineffective. (*Garcia*, *supra*, 227 Cal.App.3d at pp. 1376-1377.) We will not "disregard[] the defendant's lay status and his admitted ignorance of the law" by faulting him for his inability to distinctly express his desire to withdraw his plea. Defendant made multiple efforts to obtain a *Marsden* hearing during the discussion concerning the motion to withdraw the plea, and cannot be penalized for his failure to expressly state that he wanted to withdraw the plea. Trial counsel had informed the trial court of defendant's position, and considering that defendant was prevented from giving any reason for the *Marsden* motion, it cannot be assumed he had the opportunity to state that he wanted to withdraw his plea. Because we have no means to evaluate counsel's representation, we likewise have no means to evaluate whether counsel's decision to refuse to present a motion to withdraw defendant's plea constituted ineffective assistance. Accordingly, we remand for the trial court to properly consider defendant's reasons for moving to substitute counsel and to appoint new counsel to investigate and present the motion to withdraw the plea if defendant "'presents a colorable claim that he was ineffectively represented.'" (*Id.* at p. 1377.) In the event that defendant fails to present a colorable claim, the trial court may deny the motion for substitution of counsel. (*Ibid.*)

Whether the Trial Court Erred in Imposing Attorney Fees Under Section 987.8

At sentencing, the trial court ordered defendant to pay $110 in attorney fees. No evidence had been submitted as to defendant's financial situation, no hearing on his ability to pay had been held, and the trial court did not offer any basis for ordering defendant to pay the attorney fees.

Section 987.8, subdivision (c) provides in pertinent part: "In any case in which the defendant hires counsel replacing a publicly provided attorney; in which the public defender or appointed counsel was required by the court to proceed with the case after a determination by the public defender that the defendant is not indigent; or, in which the defendant, at the conclusion of the case, appears to have sufficient assets to repay, without undue hardship, all or a portion of the cost of the legal assistance provided to him or her; . . . the court shall make a determination of the defendant's ability to pay . . . ." The trial court may order the defendant to pay attorney fees but only if a finding has been made with respect to the defendant's ability to pay such fees. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398.) A finding that the defendant has the ability to pay fees must be supported by substantial evidence. (*Ibid*.) Where a defendant has been deprived of notice and a hearing as required by section 987.8, remand is appropriate. (*People v. Flores* (2003) 30 Cal.4th 1059, 1068-1069.)

In this case, the trial court did not hold a hearing to determine defendant's ability to pay attorney fees or offer a rationale for ordering defendant to do so. We therefore agree with the parties that the case must be remanded for notice and a hearing on defendant's ability to pay.

DISPOSITION

We reverse the judgment and remand the matter to the trial court to hold a hearing on defendant's *Marsden* motion for substitution of counsel. If the court finds defendant has shown that a failure to replace his appointed attorney would substantially impair his

right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make. If newly appointed counsel makes no motions, any motions made are denied, or defendant's *Marsden* motion is denied, the court shall reinstate the judgment. Additionally, we reverse the order directing defendant to pay $110 in attorney fees and remand for the trial court to provide notice and a hearing under section 987.8, subdivision (b) concerning his ability to pay attorney's fees.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.